

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO SUMMARY ORDERS FILED AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY THIS COURT'S LOCAL RULE 32.1 AND FEDERAL RULE OF APPELLATE PROCEDURE 32.1. IN A BRIEF OR OTHER PAPER IN WHICH A LITIGANT CITES A SUMMARY ORDER, IN EACH PARAGRAPH IN WHICH A CITATION APPEARS, AT LEAST ONE CITATION MUST EITHER BE TO THE FEDERAL APPENDIX OR BE ACCOMPANIED BY THE NOTATION: "(SUMMARY ORDER)." A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF THAT SUMMARY ORDER TOGETHER WITH THE PAPER IN WHICH THE SUMMARY ORDER IS CITED ON ANY PARTY NOT REPRESENTED BY COUNSEL UNLESS THE SUMMARY ORDER IS AVAILABLE IN AN ELECTRONIC DATABASE WHICH IS PUBLICLY ACCESSIBLE WITHOUT PAYMENT OF FEE (SUCH AS THE DATABASE AVAILABLE AT [HTTP://WWW.CA2.USCOURTS.GOV/](http://www.ca2.uscourts.gov/)). IF NO COPY IS SERVED BY REASON OF THE AVAILABILITY OF THE ORDER ON SUCH A DATABASE, THE CITATION MUST INCLUDE REFERENCE TO THAT DATABASE AND THE DOCKET NUMBER OF THE CASE IN WHICH THE ORDER WAS ENTERED.

At a stated term of the United States Court of Appeals
for the Second Circuit, held at the Daniel Patrick Moynihan
United States Courthouse, 500 Pearl Street, in the City of
New York, on the 23rd day of October, two thousand seven.

PRESENT:

HON. JOHN M. WALKER, JR.,
HON. GUIDO CALABRESI,
HON. PETER W. HALL,
Circuit Judges.

FEN XING CHEN,
Petitioner,

v.

07-0821-ag
NAC

PETER D. KEISLER,¹
ACTING U.S. ATTORNEY GENERAL,
Respondent.

¹ Pursuant to Federal Rule of Appellate Procedure 43(c)(2), Acting Attorney General Peter D. Keisler is automatically substituted for former Attorney General Alberto R. Gonzales as a respondent in this case.

FOR PETITIONER: Oleh R. Tustaniwsky, Hualian Law
Offices, New York, New York.

FOR RESPONDENT: Peter D. Keisler, Assistant Attorney
General; Terri J. Scadron, Assistant
Director; Andrew Paul Kawel, Intern,
Office of Immigration Litigation,
United States Department of Justice,
Washington, D.C.

UPON DUE CONSIDERATION of this petition for review of a Board of Immigration Appeals ("BIA") decision, it is hereby ORDERED, ADJUDGED, AND DECREED, that the petition for review is DENIED.

Fen Xing Chen, a native and citizen of the People's Republic of China, seeks review of a February 15, 2007 order of the BIA affirming the June 28, 2005 decision of Immigration Judge ("IJ") Douglas B. Schoppert, which denied his application for asylum, withholding of removal, and relief under the Convention Against Torture ("CAT"). *In re Fen Xing Chen*, No. A95 673 370 (B.I.A. Feb. 15, 2007), *aff'g* No. A95 673 370 (Immig. Ct. N.Y. City June 28, 2005). We assume the parties' familiarity with the underlying facts and procedural history in this case.

When the BIA issues an opinion that fully adopts the IJ's decision, we review the IJ's decision. See, e.g., *Chun Gao v. Gonzales*, 424 F.3d 122, 124 (2d Cir. 2005); *Secaida-Rosales v. INS*, 331 F.3d 297, 305 (2d Cir. 2003). We review the agency's factual findings, including adverse credibility determinations, under the substantial evidence standard. See 8 U.S.C. § 1252(b)(4)(B); *Zhou Yun Zhang v. INS*, 386 F.3d 66, 73 & n.7 (2d Cir. 2004), *overruled in part on other grounds by Shi Liang Lin v. U.S. Dept. of Justice*, 494 F.3d 296, 305 (2d Cir. 2007) (en banc).

As an initial matter, Chen is not eligible for either asylum or withholding of removal as the spouse of someone who was forced to have an abortion. We are bound by our recent *en banc* decision in *Shi Liang Lin*, 494 F.3d 296, which held that an individual, like Chen, whose spouse was allegedly forced to undergo an involuntary abortion does not automatically qualify for asylum as a refugee under § 601(a)

of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA") (amending 8 U.S.C. § 1101(a)(42), Immigration and Nationality Act ("INA") § 101(a)(42)). Because Chen's application with regard to his family planning claim was based solely on his wife's forced abortion, and not on any "other resistance to a coercive population control program," 8 U.S.C. § 1101(a)(42)(B), Chen has not, as a matter of law, established past persecution under *Shi Liang Lin* and is thus not eligible for relief on that ground.

As to Chen's claims related to Falun Gong, we find that substantial evidence supports the agency's adverse credibility determination. Chen's omission from his airport interview and credible fear interview of the significant fact of his wife's alleged forced abortion provided a sufficient basis on which the agency could conclude that he was not credible.² See *Cheng Tong Wang v. Gonzales*, 449 F.3d 451, 453-54 (2d Cir. 2006) (finding that the agency's adverse credibility determination was not based on flawed reasoning where the applicant failed to mention his wife's forced sterilization despite the fact that his claim for asylum was based on his failure to comply with China's family planning policy); see also *Jin Hui Gao v. U.S. Att'y Gen.*, 400 F.3d 963, 964 (2d Cir. 2005) (upholding an IJ's adverse credibility finding where the IJ relied, in part, on the applicant's failure to mention his wife's forced abortion prior to his hearing). Additionally, the IJ reasonably found that Chen's purported fear of future persecution was not credible where he willingly returned to China after vacationing in Singapore despite the fact that during that time he was allegedly hiding from government officials who were seeking to arrest him for his support of Falun Gong. Moreover, we find that no reasonable fact finder would be compelled to accept Chen's explanations for the discrepancies in the record. See *Majidi v. Gonzales*, 430 F.3d 77, 80-81 (2d Cir. 2005).

² We find that in light of the IJ's assessment of the reliability of Chen's initial interviews and the evidence of reliability in the record, the IJ properly considered the interview reports and transcript in making his credibility determination. See *Ramsameachire v. Ashcroft*, 357 F.3d 169, 179-80 (2d Cir. 2004).

Because the only evidence of a likelihood that Chen would be persecuted or tortured depended upon his credibility, the adverse credibility determination in this case necessarily precludes success on his claims for withholding of removal and CAT relief. See *Paul v. Gonzales*, 444 F.3d 148, 156 (2d Cir. 2006) (noting that a withholding claim necessarily fails if the applicant is unable to show the objective likelihood of persecution needed to make out an asylum claim); cf. *Ramsameachire*, 357 F.3d at 184-85 (holding that the agency may not deny a CAT claim solely on the basis of an adverse credibility finding made in the asylum context, where the CAT claim did not turn upon credibility).

For the foregoing reasons, the petition for review is DENIED. As we have completed our review, any stay of removal that the Court previously granted in this petition is VACATED, and any pending motion for a stay of removal in this petition is DISMISSED as moot. Any pending request for oral argument in this petition is DENIED in accordance with Federal Rule of Appellate Procedure 34(a)(2), and Second Circuit Local Rule 34(d)(1).

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk

By: _____